**Congressional Briefing on the**

**Scope of Executive Power Since 9/11:**

**Presidential Authority to Conduct Warrantless Electronic Surveillance**

**Before Members of the**

**Committees of the Judiciary and the Select Committee on Intelligence**
**House of Representatives**

**Statement of Kate Martin**
**Director, Center for National Security Studies**

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The President claims he has authority as the Commander-in-Chief to conduct warrantless wiretaps of Americans. But when Congress enacted the Foreign Intelligence Surveillance Act in 1978, it expressly rejected the President's claim of inherent authority to conduct warrantless wiretaps. It then went further and made it a crime to conduct such wiretaps.

The President has acted contrary to the express will of the Congress. The Supreme Court has never approved a claim of presidential authority to authorize acts outlawed by the Congress.

When Congress authorized secret wiretaps for national security purposes in 1978, it intended to prevent any future President from carrying out warrantless eavesdropping on Americans. It made its intention clear in five different sections of the law.

1. When Congress enacted FISA in 1978, it explicitly refused to provide an exception to enable the President to eavesdrop on Americans without getting a judicial warrant. It repealed the provision which the government had relied upon in claiming inherent presidential authority for warrantless wiretaps:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to

[*] This statement was prepared with the assistance of Brittany Benowitz at the Center for National Security Studies

> protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." Pub. L. No. 90-351, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510-2520 (1968)).

The government had argued in the Keith case that this provision supported the President's constitutional authority to conduct warrantless wiretaps; but the Court found it neutral on the President's authority, not congressional authorization for warrantless surveillance. *United States v. United States District Court [Keith]*, 407 U.S. 297, 303 (1972).

2. Congress also refused to enact the language proposed by the Ford administration that: "[n]othing contained in this chapter shall limit the constitutional power of the President to order electronic surveillance for the reasons stated in section 2511(3) of title 18, United States Code, if the facts and circumstances giving rise to such order are beyond the scope of this chapter." S. 3197, 94th Cong. 2d Sess, § 2528 (Mar. 23, 1976), reprinted in *Hearings on S. 743, S. 1888, S. 3197 Before the Subcomm. On Criminal Laws and Procedures of the Senate Judiciary Comm.*, 94th Cong., 2d Sess. 134 (1976) (stating in the first page of the report that S. 3197 was identical to the measure transmitted to the Senate by the President on March 23, 1976).

3. Instead, in FISA Congress enacted a *comprehensive* scheme governing all foreign intelligence wiretaps, including provisions for emergency wiretaps in advance of warrants and wiretaps of leased lines by foreign embassies inside the US without warrants, because foreign governments are not covered by the Fourth Amendment. It expressly provided that after a declaration of war the Attorney General could authorize warrantless wiretaps for 15 days.

Those steps alone would have sufficed to prohibit warrantless wiretaps, but the Congress went further.

4. It expressly made it a crime for government officials "acting under color of law" to engage in electronic eavesdropping "other than pursuant to statute." 50 U.S.C. 1809.

5. Congress again made explicit that the FISA and the criminal wiretap laws "shall be the exclusive means by which electronic surveillance … communications may be conducted**."** (Now codified at 18 USC 2511(f)**.**) Section 201 of the FISA as enacted in 1978 provided that:

> Nothing contained in this chapter, or section 605 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and

> electronic communications may be conducted. Pub. L. No. 95-511, 92 Stat. 1783, § 201 (1978).

The legislative history confirms Congress' intent to limit the authorities for wiretapping. As the conference report explains:

> The Senate Bill provided that the procedures in this bill and in Chapter 119 of Title 18, United States Code, shall be the exclusive means by which electronic surveillance, as defined in this bill, and the interception of domestic wire and oral communications may be conducted. The House amendments provided that the procedures in this bill and in Chapter 119 of Title 18, U.S.C. shall be the exclusive *statutory* means by which electronic surveillance as defined in this bill and the interception of domestic wire and oral communications may be conducted. The Conference substitute adopts the Senate provision which omits the word 'statutory'. (emphasis added.) *Joint Explanatory Statement of the Committee of the Conference*, House Conference Rep. No. 95-1720, 35 (Oct. 5, 1978).

Conclusion:

Confronted with this explicit law against warrantless wiretaps, the administration is now claiming that it had authority from Congress. But its contention that the congressional resolution for the use of force following the September 11, attacks authorized its warrantless surveillance is ludicrous. FISA states that following a declaration of war by the Congress, the President, acting through the Attorney General, may institute electronic surveillance without a court order for no more than fifteen days. (50 USC 1811.) At best, the September 2001 resolution is the equivalent of a declaration of war. At most, therefore, the resolution authorized warrantless surveillance for fifteen days. Nothing in the resolution can be read as amending this specific limitation to allow unlimited warrantless surveillance.